Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1942

LEE P. BROWN,
Commissioner of Public Safety,
City of Atlanta,

Petitioner,

v.

JAMES G. MINTER, JR.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion below is reported at 243 Ga. 397, 254 S.E.2d 326 (1979)

JURISDICTION

No federal question was timely and properly raised below so as to give this Court jurisdiction to review the judgment below on writ of certiorari to the Supreme Court of Georgia.

QUESTIONS PRESENTED

I. Whether the Court has jurisdiction to correct an alleged error in the application of state, not federal, law by the Supreme Court of Georgia in that court's interpretation of Georgia's Open Records Act.

II. Whether the Petitioner raised any constitutional issue below in a timely and proper manner and whether any such question was decided by the Supreme Court of Georgia.

III. Assuming that the Petitioner timely and properly raised the question below, whether a custodian of public records concerning closed internal investigations by the Atlanta Police Department is required by the first and fourth amendments to withhold from the public all or any portion of those records which might reveal embarrassing facts or allegations about police officers, when state law requires the custodian to make those records available for examination by any member of the public.

IV. Assuming that the foregoing question was timely and properly raised below, whether the Petitioner has standing to raise that question, when the records in issue would reveal no embarrassing facts about the Petitioner.

V. Assuming that the question was timely and properly raised below and also assuming that the Petitioner has standing to raise it, whether police officers, as public officials, have any constitutionally protected privacy interest under the first and fourth amendments which would require the non-disclosure of public records pertaining to internal, administrative police investigations of conduct by the officers allegedly in violation of state law or police department regulations.

VI. If the foregoing question was timely and properly raised below and if the Petitioner has standing to raise it, whether and to what extent the officers in question waived their right to whatever constitutional protection they might have been entitled.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Despite the Petitioner's assertion, neither the first nor the fourth amendment is involved in this case, since no constitutional question was timely and properly raised below. What is involved in this case is Georgia's Open Records Act, Ga. Laws 1959, p. 88, as amended, (Ga. Code Ann. §40-2701) and Ga. Laws 1967, p. 455, as amended, (Ga. Code Ann. §40-2703), accurately quoted at pages A.6 and A.7 of the Petition.

STATEMENT OF THE CASE

On December 2, 1977, the Respondent made a written request for permission to examine certain records pursuant to Georgia's Open Records Act. The Petitioner has custody of those records. They relate to and memorialize administrative investigations into alleged misconduct by police officers which were initiated and completed by the Internal Investigations Section of the Atlanta Police Department in 1976 and 1977.

Respondent's request was denied in its entirety. The only reason given for the denial was that requested documents were not "public records" within the meaning of the Open Records Act.

Thereafter, the Respondent filed this action to compel the requested examination to be allowed. In answering the complaint, the Petitioner alleged that the documents were exempt from the disclosure requirements of the Act and made the following vague assertion: "At all times herein relevant, the actions of the defendant were pursuant to the laws and constitutions of the State of Georgia and of the United States." (Answer, Third Defense) No provision of the United States Constitution was cited in support of that assertion.

After an evidentiary hearing, the trial court ruled that the requested documents had to be

produced. It found that the Petitioner had failed to prove that the records could be justifiably withheld, either under the express exception to the Open Records Act or pursuant to the balancing analysis which the Supreme Court of Georgia had applied in Houston v. Rutledge, 237 Ga. 764, 229 S.E.2d 624 (1976) (allowing public records to be withheld if the public interest against disclosure outweighed the public interest in favor of disclosure). Nevertheless, the trial court took steps to prevent whatever slight infringements upon arguable privacy interests might occur by full disclosure of the Petitioner's internal investigation files. The Petitioner was allowed to withhold " . . . those documents, records, etc., [which] form part of ongoing, active investigations, reveal the identities of actual informants, or fall within an exceptional and necessarily limited category of information maintained in citizen complaint files [i.e., files pertaining to cases initiated by citizen complaints] which contain matter which would invade the privacy of complaining private citizens if disclosed." Unpublished trial court order, pp. 7-8.

The trial court's decision was affirmed by the Supreme Court of Georgia. Neither the trial court nor the Supreme Court of Georgia found it necessary or appropriate to comment on the

Petitioner's pronouncement that his decision to withhold the documents in their entirety was " . . . pursuant to the laws and constitutions of the State of Georgia and the United States."

REASONS FOR DENYING THE WRIT

I. The Court Has No Jurisdiction to Review an Allegedly Erroneous Interpretation of a Georgia Statute by the Supreme Court of Georgia.

The Petitioner has apparently asked this Court to consider whether the Supreme Court of Georgia correctly held that the records in question did not fall within the exception to the Open Records Act and could not be justifiably withheld. The Court has no jurisdiction to review that issue under 28 U.S.C. §1257(3), which authorizes the issuance of a writ of certiorari only where a federal question is in issue.

II. The Constitutional Question Raised in the Petition Was Not Raised Below.

Rule 23(f) of the rules of this Court requires a petitioner to specify the stage in the proceedings below and the manner in which the constitutional question sought for review was raised. In the

case at hand the Petitioner has not complied with that rule and cannot do so, since the Petitioner did not present any constitutional issue for decision.

While the Petitioner asserted in his answer that his refusal to grant the Respondent's request was pursuant to the Constitution of the United States, he did not cite any provision of the Constitution in support of that assertion. No amended answer was ever filed to clarify the Petitioner's constitutional claim, and no brief on that claim was submitted to the trial court.

When the case was tried, the Petitioner did not insist that any provision of the Constitution required the document to be kept secret. Instead, he made procedural arguments and urged that the requested documents were prohibited from disclosure by state policy and were exempted from the Open Records Act. While the Petitioner did suggest that an invasion of privacy might result if the requested documents were disclosed (Transcript, p. 51), he did not intimate that any constitutional considerations were at stake, but merely raised that point in connection with the statutory exception for " . . . medical records and similar files, the disclosure of which would be an invasion of personal privacy." Ga. Code Ann. §40-2703. Although he has now asked this Court to review an issue which he has described

as arising under the first and fourth amendments, the Petitioner did not refer to either of those amendments at the trial.

When the case was appealed, the Petitioner did not raise any constitutional claim in his enumerations of error. He merely contended that the trial court erred (1) in allocating the burden of proof, (2) in failing to rule that the Respondent had not carried his burden of proof, (3) in failing to rule that the requested documents were excluded from the Open Records Act, and (4) in failing to rule that the requested documents fell within the Act's exception. The Supreme Court of Georgia therefore had no occasion to consider the constitutional question which the Petitioner has now suggested.

Under Georgia law, a constitutional question must be presented to the trial court for decision and may not be raised for the first time on appeal. Law v. State, 219 Ga. 583, 134 S.E.2d 776 (1964); Airways Parking Company v. City of Atlanta, 229 Ga. 70, 189 S.E.2d 405 (1972). A party who seeks to raise a constitutional question must specify in his pleadings the portions of the Constitution under which he relies. Morrow v. City of Atlanta, 162 Ga. 228, 133 S.E. 345 (1926); Taylor v. Moultrie Tobacco Sales Board, Inc., 227 Ga. 384, 180 S.E.2d 737 (1971). Where a constitutional question is presented only in a brief of counsel,

no ruling on the issue may be made. Edwards v. Bank of Talbotton, 182 Ga. 469, 185 S.E. 824 (1936).

Because the Petitioner failed to preserve his purported constitutional claim in the manner which Georgia law requires, that claim should not be reviewed. See Ferguson v. Georgia, 365 U.S. 570, 572, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961); In re Lamkin, 355 U.S. 59, 78 S.Ct. 137, 2 L.Ed.2d 107 (1957); Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83 (1955). "State procedural rules . . . which forbid the raising of federal questions at late stages in the case, or by any other than a prescribed method [have] been recognized as a valid exercise of state power." Williams v. Georgia, 349 U.S. 375, 382-383, 75 S.Ct. 814, 99 L.Ed. 1161 (1955).

This Court will not decide an issue which is raised for the first time in a petition for certiorari. E.g., Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998, 35 L.Ed.2d 346 (1973); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969). Accordingly, the writ should be denied.

III. The Question Raised in the Petition Is Insubstantial and Unworthy of the Writ.

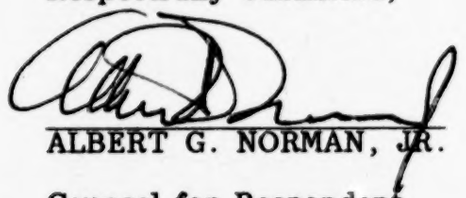
The Petitioner is concerned that if internal investigation files are made available to the public, police officers against whom specious allegations of misconduct have been made will be embarrassed and will suffer injury to their reputation. The Petitioner would therefore argue that disclosure of those records would result in an unconstitutional invasion of privacy. However, in Paul v. Davis, 424 U.S. 693, 713, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), a case involving a libelous memorandum in which police officers identified the petitioner as an "active shoplifter", this Court held that the Constitution does not protect against injuries to reputation resulting from the publication of a record of an official act. That decision applies to the case at hand and forecloses the question which the Petitioner has sought to raise.

In the years since Paul v. Davis, supra, was decided, the Court has considered similar questions unworthy of review. See Buian v. Baughard, No. 78-1371, cert. denied April 23, 1978, 47 L.W. 3699, 3705; O'Brien v. DiGrazia, 544 F2d 543 (1st Cir. 1976), cert. denied 431 U.S. 914, 45 L.W. 3590, 3753 (1977). Just as the writ was denied in those cases, it should be denied here.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition should be denied.

Respectfully submitted,



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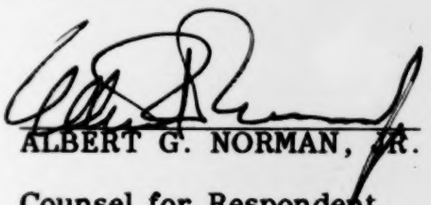
July 30, 1979.

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for Petitioner in the foregoing matter, Mr. W. Roy Mays, III, Assistant City Attorney, City of Atlanta, 2000 Fulton National Bank Building, Atlanta, Georgia 30303, with a copy of BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, by depositing same in the United States Mail in a properly addressed envelope, with adequate postage thereon.

This 30th day of July, 1979.



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